

LETTER OPINION
2002-L-10

February 12, 2002

Ms. Mary K. O'Donnell
Roulette County State's Attorney
PO Box 1079
Rolla, ND 58367-1079

Dear Ms. O'Donnell:

Thank you for your letter asking whether an attorney provided by the North Dakota Insurance Reserve Fund to represent a county or a county agency must be appointed by the county state's attorney as an assistant state's attorney of that county and whether a contract providing for legal representation of a county by an attorney retained by the North Dakota Insurance Reserve Fund must be interpreted as requiring that attorney to be appointed as an assistant state's attorney for the county.

Roulette County has entered into a general liability insurance contract with the North Dakota Insurance Reserve Fund (NDIRF). As part of the county's contract, NDIRF reserved the "right and duty" to defend against claims or suits, including a provision stating that NDIRF "may investigate and settle any claim or 'suit' at our [NDIRF's] discretion." Memorandum of Coverage, pp. 2-3. You informed a member of my staff that you have been satisfied with the legal representation Roulette County has received from NDIRF in the past. However, you have not been able to resolve a dispute with NDIRF over an ongoing representation to your satisfaction. You have also requested that NDIRF replace this attorney and have been refused.

NDIRF is an incorporated government self-insurance pool organized pursuant to N.D.C.C. ch. 32-12.1. Government self-insurance pools are regulated by the Commissioner of Insurance under N.D.C.C. ch. 26.1-23.1. The members of NDIRF are state agencies or political subdivisions within the state of North Dakota that have made fund contributions or premium payments in order to insure against their legal liabilities. N.D.C.C. § 26.1-23.1-01. A government self-insurance pool must be governed by a board of directors elected by pool members. N.D.C.C. § 26.1-23.1-03. A government self-insurance pool is not an insurance company or insurer. N.D.C.C. § 26.1-23.1-02. "The governing body of a government self-insurance pool supported by public funds and spending public funds performs a government function." Letter from Attorney General Nicholas Spaeth to Ken Solberg (Aug. 2, 1991). "NDIRF's function is no different from that

of the governing body of a political subdivision which elects to establish an individual self-insurance fund, except that NDIRF is the governing authority designated to administer pool funds on behalf of numerous participating members.” Id. A joint enterprise of several counties is an agency of those counties. 1998 N.D. Op. Att’y Gen. 004 at p. 020. Therefore, NDIRF is an agent of the counties and of the other political subdivisions or state agencies that are its members.

Counties may act only pursuant to statutes enacted by the Legislature, and are political subdivisions of the state whose rights and powers are determined and defined by law. McKenzie County v. Hodel, 467 N.W.2d 701, 707-08 (N.D. 1991) (Vande Walle J. concurring). The board of county commissioners has no right to perform the duties of other elected officials or to exercise their prerogatives, and it has no right to delegate such authority to others. Murphy v. Swanson, 198 N.W. 116, 119-20 (N.D. 1924). The county state’s attorney is the elected officer who has the duty to represent the county in legal matters. Id. at 119. The board of county commissioners has no authority to employ another attorney to perform the state’s attorney’s duties unless specifically granted that authority by statute. Fox v. Jones, 102 N.W. 161, 162 (N.D. 1905). The board of county commissioners may employ additional counsel to assist the state’s attorney, but only with the advice and consent of the state’s attorney. N.D.C.C. § 11-16-08.

Therefore, the board of county commissioners is without authority to hire a private attorney for county business without first obtaining the advice and consent of the county state’s attorney. 2001 N.D. Op. Att’y Gen. L-37. Within very limited exceptions that are not applicable here,¹ only the state’s attorney or another attorney approved by the state’s attorney may lawfully represent a county or a county agency. In order to lawfully fulfill the state’s attorney’s duties, the assisting attorney must be appointed as an assistant state’s attorney. N.D.C.C. § 11-16-02. NDIRF, as the board of county commissioner’s agent, cannot exceed the power of the board and hire a private attorney for county business without first obtaining the advice and consent of the county state’s attorney. See Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (statutory duty imposed on political subdivision cannot be circumvented by delegation to a third party). Therefore, NDIRF cannot tender a proper legal defense on behalf of its county members unless the attorney offering the defense is a state’s attorney or an appointed assistant state’s attorney.²

¹ For example, N.D.C.C. § 11-16-06 allows the district court to appoint an attorney to represent the county or to request the Attorney General to represent the county if the court finds the state’s attorney is absent, unwilling or unable to perform certain duties of the office. See also, 2001 ND Op. Att’y Gen. L-37.

² The power to appoint generally carries with it the power to revoke the appointment. 1997 N.D. Op. Att’y Gen. L-135.

“Agreements will not be enforced if they have a tendency to be injurious to the public or [are] against the public good.” Muscatell v. N.D. Real Estate Com’n, 546 N.W.2d 374, 378 (N.D. 1996) (citing Johnson v. Peterbilt of Fargo, Inc., 438 N.W.2d 162, 163 (N.D. 1989), and N.D.C.C. § 9-08-01.) A government agency has no authority to violate public policy, as evidenced by state statutes, through an agreement. Muscatell, 546 N.W.2d at 378; Singha v. State Bd. of Medical Examiners, 574 N.W.2d 838, 847 (N.D. 1998). The agreement between NDIRF and its county members for insurance coverage must be interpreted consistently with state law which requires the advice and consent of the county state’s attorney before a private attorney may conduct county business.³ A review of the memorandum of coverage between Rolette County and NDIRF, NDIRF’s articles of incorporation and other materials including NDIRF’s bylaws, reveals no provisions directly in conflict with state laws requirement that counties must be represented by the county state’s attorney or a person who has been appointed with the advice and consent of the county state’s attorney.

Therefore, it is my opinion that an attorney provided by the North Dakota Insurance Reserve Fund to represent a county or a county agency must be appointed by the state’s attorney as an assistant state’s attorney of that county and the contract providing for legal representation of a county by an attorney retained by the North Dakota Insurance Reserve Fund must be interpreted consistently with state law requiring that attorney to be appointed as an assistant state’s attorney for the county.⁴

Sincerely,

Wayne Stenehjem
Attorney General

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³ See Storbeck v. Oriska School Dist. No. 13, 277 N.W.2d 130, 134 (N.D. 1979) (“existing law at the time of the formation of the contract becomes part of the contract”); Great Plains Supply Co. v. Mobile Oil Co., 172 N.W.2d 241, 247 (N.D. 1969) (“A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.”).

⁴ Essentially, both NDIRF and the state’s attorney may veto the other’s choice of counsel. This fact requires NDIRF and the state’s attorney to cooperate when hiring and appointing counsel, and they will also have to cooperate if concerns are raised about performance, litigation management, or legal strategy.